Supreme Court, U.S.
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No. 92-1646

In the Supreme Court of the United States

OCTOBER TERM, 1992

MICHAEL L. BARKLEY, PETITIONER

v.

UNITED STATES OF AMERICA
(AND OTHER CASES)

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

DAYTON M. CRAMER
Colonel, JAGC, USA
Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency
Falls Church, VA 22401-5013

QUESTIONS PRESENTED

1. Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocate General to select commissioned officers in the military as court-martial trial judges and judges of the courts of military review.

2. Whether due process requires that military judges have fixed terms of office.

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This certiorari petition was filed on behalf of 273 different servicemembers from every branch of the Armed Forces. Petitioners were convicted at separate trials of offenses under the Uniform Code of Military Justice. Petitioners raise two claims. First, they argue that the military trial and appellate judges in their cases were not qualified to hold those positions because they were appointed to them by the Judge Advocates General in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. Second, petitioners claim that their trials and appeals to the courts of military review were fundamentally unfair because the military judges sitting on those

courts do not enjoy a fixed term of office and can be reassigned to other military duties by the Judge Advocate General based on his evaluation of their performance as judges.

Ordinarily, we would summarize for the Court the proceedings below and, in the course of doing so, explain whether the questions presented in the certiorari petition were pressed in or passed on by the courts below, as directed by Rule 15.1 of this Court's Rules. See, *e.g.*, *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 815-816 (1985). In light of the large number of petitioners who have joined in this petition, however, that course is not feasible in this case. Nonetheless, we do note that several other servicemembers who previously sought to raise those claims did not preserve their claims for review in this Court. See, *e.g.*, *Bolado* v. *United States*, cert. denied, 113 S. Ct. 321 (1992); *Allen* v. *United States*, cert. denied, 113 S. Ct. 324 (1992). Although petitioners claim that Question 1 was raised in every case—unlike Question 2, which petitioners concede was not—petitioners do not make clear whether they raised Question 1 in the lower military courts or only in the Court of Military Appeals.[1]

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[1] The Court of Military Appeals has stated that it will accept out-of-time requests for relief from servicemembers if this Court were to grant relief to servicemembers in any of the other cases presently pending before the Court raising the same issues. *United States* v. *Rice*, 36 M.J. 264 (1993), *reprinted at* Pet. App. 91a-92a. But the Court of Military Appeals did not state whether it would excuse a defendant's failure properly to preserve such a claim.

On the merits, petitioners' claims are not materially different from the claims raised by the petitioners in *Graf* v. *United States*, No. 92-1102, and *Weiss* v. *United States*, No. 92-1482. We have already responded to those claims in our briefs in opposition in those cases. We rely on those responses here.[2]

For the foregoing reasons, it is respectfully submitted that the petition for writs of certiorari should be denied.

WILLIAM C. BRYSON
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Colonel, JAGC, USA
Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency

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[2] We have supplied petitioners' counsel with a copy of our briefs in opposition in *Graf* and *Weiss*.